No. 557.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

~~No. 449.~~

E. L. WHITNEY, WARDEN OF THE IDAHO STATE PENITENTIARY, PETITIONER,

vs.

GEORGE DICK, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK E. FOGG,
Attorney for Respondent.

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vs.

GEORGE DICK, RESPONDENT.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

The respondent submits at this time argument only upon such points as are deemed necessary in the consideration of the question of the issuance of the writ.

The propriety of the issuance of the writ must be measured solely by the provisions of section 6 of the Circuit Court of Appeals act.

The judgment of the Circuit Court of Appeals is final in *habeas corpus* proceedings in the sense and to the extent that a review by this court cannot be demanded as a matter of right.

This court, in its discretion, undoubtedly has jurisdiction to bring up any case in which judgment of the Circuit Court of Appeals is made final by said act.

The conditions and considerations under which this court will exercise such discretionary power are stated and defined in the decision of this court on the application for the writ in the matter of Lau Ow Bew *vs.* United States, 141 U. S., 583, as follows:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instructions, and it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final, to be certified, can be properly invoked.

"The inquiry upon the application, therefore, is, whenever the matter is of *sufficient importance* in itself and *sufficiently open to controversy*, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here upon appeal or writ of error."

In the case last cited there was involved questions of the construction of the Chinese restriction act in the light of treaties between the governments of the United States and China. These exceptional matters of national importance the court in that case deemed sufficient for the issuance of the writ.

In the decision of the same case upon the merits, upon the return of the writ of certiorari, this court, again speaking of the practice in cases of this kind, after referring to the object of the act being to restrict appeals to this court except in certain cases, and that by its provisions the appellate jurisdiction was distributed between the two courts and judgment in certain classes of cases made final in the Circuit Court of Appeals, said:

"And as certiorari will only issue where questions of *gravity and importance* are involved, or in the interest of uniformity of decisions, the object of the act is thereby obtained."
Lau Ow Bew *vs.* United States, 144 U. S., 58.

Applying these settled principles to the case at bar, the inquiry, then, is, first, Does this case involve matters of peculiar and extraordinary gravity and importance? Second, Are the questions of law presented sufficiently open to doubt and controversy?

Subdivision 3 of rule 37 of this court provides "where application is made to this court under section 6 of said act to require a case to be certified to it for its review and determination, *a certified copy of the entire record* of the case in the Circuit Court of Appeals shall be furnished this court by the applicant as part of the application."

The purpose of this rule undoubtedly is to enable this court to have before it the entire case before issuance of the writ, so that it may make an examination sufficiently exhaustive to determine in advance of the issuance of the writ whether the matter presented is such when weighed by the criterions above stated as to impel the court to issue the writ.

The honorable solicitor general has failed to accompany his application with a certified copy of the proceedings in the Circuit Court of Appeals, as required by said rule 37, but has referred (on page No. 3 of his petition) to the fact that the record in the appeal from said judgment, Whitney *vs.* Dick, No. 494 of this term, has been printed and is referred to in his petition. Possibly we would be warranted in suggesting that the petition be denied for non-compliance with said rule No. 37. However, we prefer that the case be determined upon its merits, and in this brief will treat the printed records referred to in petitioner's application as being a part of the petition, the same as though fully incorporated therein.

The petitioner urges, as a matter of controlling importance, the consideration of the question of the authority of the Circuit Court of Appeals to issue the writ of *habeas corpus*. We submit, even if this court should determine that the Circuit Court of Appeals was entirely without authority to

issue the writ of *habeas corpus*, that this in itself would by no means be sufficient reason for the issuance of the writ of certiorari. Our reasons for this position, concisely stated, are as follows:

The facts set forth in the petition, and particularly the facts set forth in the record referred to in the petition, show, as we maintain, without serious doubt or controversy, that Dick, the respondent, was unlawfully imprisoned and was entitled to his discharge.

Under petitioner's own showing, if the settled law warrants our view, this court is asked to issue the writ of certiorari when the only function it could serve would be, in effect, to reinstate a void judgment to remand respondent to an unlawful imprisonment.

If the same facts stated in the petition and incorporated therein, by reference, were presented here upon original application for a writ of *habeas corpus* on behalf of the respondent, Dick, this court would order his discharge.

The challenge to the jurisdiction made by the petitioner herein for the first time goes to the entire record presented here by petitioner. The primary defect in the jurisdiction was in the district court. It seems to us that the petitioner is not entitled to be relieved even of a void judgment of the Circuit Court of Appeals under a showing that he is now detaining respondent under a judgment of the district court entirely void because of the total lack of jurisdiction of said court.

CIRCUIT COURT OF APPEALS JURISDICTION IN HABEAS CORPUS CASES.

An examination of the authorities cited by the honorable solicitor general convinces us that his position that the Circuit Court of Appeals is without authority to issue the writ of *habeas corpus* is untenable.

The various statutes relating to the power of Federal courts to issue this writ should receive, in our judgment,

broad construction in the light of the paramount importance that was attached to this writ by the framers of the Constitution, and, in view of the uniform course of the decisions of this court, giving always to those statutes a construction sufficiently broad to enable *all its courts* within their respective jurisdictions to relieve from unlawful imprisonment in all cases where the same was under the color of Federal authority or in violation of rights under the Constitution and laws of the United States, and applying the rule of strict construction contended for by the honorable solicitor general only when the writ was invoked in cases tending to invade the legitimate province and jurisdiction of the State courts.

Chief Justice Marshall, in *Ex parte* Bollman, 4 Cranch, 95, said:

"Congress, acting under the immediate influence of this injunction (article 1, section 9), must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity: for, if the means be not in existence the privilege itself would be lost although no law for its suspension should be enacted. Under the influence of this obligation they gave to *all the courts* the power of awarding writs of *habeas corpus*."

Speaking of the contention made in that case, that the Supreme Court was without authority to issue the writ under statute which, in terms, gave that authority only to the justices, Chief Justice Marshall said:

"It would be strange if the judge sitting on the bench should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chambers and, in private, receive and decide upon the motion" (*Ex parte* Bollman, *supra*).

In *Ex parte* Dorr, 3 How., 104, 105, a strict construction of the statute is invoked as against the invasion of the jurisdiction of the State courts.

Ex parte Parks, 93 U. S., 22, decides that court would not discharge prisoner under commitment unless proceedings were entirely void.

Ex parte Hung Hang, 108 U. S., 552, is simply restrictive of the exercises of original jurisdiction by the Supreme Court.

In re Burrus, 156 U. S., 591, the court said the application for the writ "must be founded on some matter which justifies the exercise of Federal authority and which is necessary to the enforcement of rights under the Constitution, laws or treaties of the United States." And further says:

"*All courts* of the United States and the *justices and judges* of *all its courts*, are authorized to issue writs of *habeas corpus* when imprisonment is supposed to be in violation of the laws of the United States."

Neither does the view of Judge Cooley, as expressed in his work upon Statutory Limitations, seem to bear out the contention of the honorable solicitor general to the extent of invoking the rule of strict construction of the statutes in determining what particular courts of the United States have jurisdiction, and would seem to go only to the extent that the power of all courts of the United States are strictly limited to Federal matters, but as to those, all its courts are broadly granted power to issue the writ (Cooley's Statutory Limitations, 422).

Speaking of the provisions of the act of February 5, 1867, 4 Stat., 385, since incorporated with other provisions in section No. 753, Revised Statutes, in *Ex parte* McCurdle, 6 Wall., 318, Chief Justice Chase said:

"This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of *every court* and *every judge*, every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."

In *Ex parte* Caldwell, 138 Federal, 488, it is assumed that the right existing in the Federal courts to issue the writ is conferred by sections 716, 751, 752, and 753, Revised Statutes.

The honorable solicitor general contends that section 716, Revised Statutes, does not confer power upon the courts to issue writs of *habeas corpus*, but that the power is conferred to issue such writs solely by provisions of 751, 752, and 753, Revised Statutes, and that therefore the provision of section 12 of the Circuit Court of Appeals act, granting to that court all powers specified in said section 716, was not effective as conferring upon that court the power to issue writ of *habeas corpus*.

It would seem to us that said section 716 would, by its terms, be clearly sufficient to grant the power in all cases where such writs "*may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.*"

Brushing aside mere technical rules of statutory construction, it seems to us clear that there is nothing in sections 751, 752, and 753 to indicate that the specific power granted by sections 751 and 752 was, in any manner, intended to restrict the power granted in general terms by said section 716 to *all courts* to issue this writ. Section 751 specifically grants this power to courts. Section 752 specifically grants this power to judges. Section 753 prohibits the issuance of the writ when persons are in jail under color of authority of the United States except under certain conditions. The purpose of these sections is not restrictive of the power of any court to issue this writ, but it does confer specifical power upon the judges of the court to issue the writ and restricts the conditions under which the writ shall be issued.

It was not necessary for Congress to adopt section 752 to confer power upon the judges of the Circuit Court of Appeals to issue this writ, as they already had the power by virtue of being either circuit or district judges. Neither was it

necessary in said act to refer to section 753, as that section related in no manner to the jurisdiction of courts to issue the writs, but to the right to the writ, whereas section 716 was a general section, authorizing the issuance of all the usual writs necessary to the exercise by all courts of their respective jurisdictions.

By section 4 of Circuit Court of Appeals act all appellate jurisdiction was taken from circuit courts and was conferred upon the Circuit Court of Appeals. Having deprived the circuit courts entirely of their appellate or supervisory control over the district courts and conferred this power upon the Circuit Court of Appeals, the presumption is strong that Congress intended to give to the Circuit Court of Appeals jurisdiction to issue all such writs as have ordinarily been considered necessary for the convenient exercise of such supervisory functions. The issuance of the writ of *habeas corpus* by an appellate court, under our system of practice, has always been considered a part of the machinery by which it indirectly exercises its supervisory power over courts of inferior jurisdiction.

In *Ex parte* Caldwell, 138 Fed., 488, the court says:

"It will thus be seen that the power of the Federal courts to issue this writ is coextensive with the common-law power, provided only that it be not used for delivery of prisoners in jail, except in cases specified."

The question of the power of the Circuit Court of Appeals to issue the writ of *habeas corpus* does not seem to have been passed upon directly by this court, but it seems to have been assumed in the decision in the case of *In re* Heff, 197 U. S., 488. We find the following statement by the court on page 489:

"The Court of Appeals of the 8th circuit, having decided the questions involved adversely to his contention, he presented this application for writ of *habeas corpus* directly to this court."

We take this to be a suggestion that his application would more properly have been presented to the Circuit Court of Appeals, excepting that the adverse decision of that court upon the same questions prevented an effectual remedy in that court.

The Circuit Court of Appeals of the eighth circuit has assumed jurisdiction to issue the writ *In re* Levitt, 117 Federal Reporter, 448. The Circuit Court of Appeals in the fourth circuit concludes that there can be no question as to the power of that court to issue the writ of *habeas corpus* (*In re* Buskirk, 72 Federal, 14–22).

The very purpose of the Circuit Court of Appeals act was to relieve this court of the great burden imposed under the then existing system incident to the growth of the country since the organization of the court. It was the intention of Congress to create a court of broad and comprehensive appelate and supervisory powers over the district and circuit courts, and with this in view no good reasons suggest themselves why this court should not have been entrusted with the issuance of the writ of *habeas corpus*, with powers coextensive, at least, with the circuit courts, to the appellate jurisdiction of which it entirely succeeded. Construing the act in the light of these considerations, we have no doubt that it was intended to confer this power by the provisions of section 12 of said act, wherein the Circuit Court of Appeals is granted all the powers specified in section 716 of the Revised Statutes.

Another important consideration favoring such construction is the fact that at all times since the organization of this Government all of its courts of record and of general jurisdiction have been entrusted with the power of the issuance of writs of *habeas corpus*. There seems to have been a consistent purpose on the part of Congress to give to the provisions of article 1, section 9, of the Constitution its fullest efficiency by granting the power to issue writs of *habeas corpus* to all of the Federal courts.

MATTERS INVOLVED NOT SUFFICIENTLY OPEN TO CONTROVERSY.

Herein we shall only discuss the matters presented by the honorable solicitor general in the second section of his brief with a view of considering whether or not the matters of law involved are sufficiently open to controversy or doubt to warrant the issuance of the writ of certiorari.

We maintain that an examination of the petition and record shows that all the vital and essential questions of law involved have been plainly, explicitly, and conclusively settled and determined by this court adversely to the petitioner's contention in the case of *In re* Heff, 197 U. S., 488.

It is conceded by the solicitor general in his petition (page 2), and is conclusively shown by the record, that the respondent, George Dick, was convicted in the district court of Idaho of the offense of introducing liquor into the former Nez Perce Indian reservation.

It is conceded that the alleged offense was committed in the village of Culdesac, a municipal organization of the State of Idaho, which is located upon lands to which the Indian title had been extinguished, and the title of which had passed from the United States to the probate judge of Nez Perce county in trust for the inhabitants of said village of Culdesac. There is no dispute whatever about any of these facts.

There is no contention on behalf of petitioner that the place where the alleged offense was committed is an Indian reservation or a place reserved by the Government for the use or control of Indians or for any other Government purpose.

The single issue of law only is clearly presented: Has the United States jurisdiction, for the purpose of police control, over the territory embraced within the said village of Culdesac?

The honorable solicitor general contends that the United States has jurisdiction because of a clause in a treaty or

agreement with the Nez Perce Indians, ratified on the 3d day of May, 1903, providing, in substance, that the laws of the United States prohibiting the introduction of liquor into the Indian country shall remain in force over the land ceded for a period of twenty-five years.

This position is untenable:

First. Because the effect of such an agreement, if upheld, would be to establish a divided sovereignty over certain definite territory for the purpose of police control, and to deprive the State of Idaho of full police control over its own citizens within its own territory, and therefore such an agreement is void, and the act of Congress tending to give it effect unconstitutional.

In re Heff, 197 U. S., 488.

Second. The agreement of the Nez Perce Indians, in so far as it attempted to provide for the future police control of the territory ceded, is void, it being against public policy for the Government to barter with its citizens to place limitation on its future policy in regard to matters of mere police regulation.

Boyd *vs.* Alabama, 94 U. S., 650.
New York & N. E. R. R. *vs.* Bristol, 151 U. S., 567.
Holden *vs.* Hardy, 169 U. S., 392.

Third. The agreement of the Nez Perces, as ratified by an act of Congress, dissolved the tribal relations of the Nez Perces, and, by acceptance of allotments, all members of that tribe became citizens of the State of Idaho and subject to all the laws of that State, both civil and criminal. The clause in the so-called treaty providing that the laws prohibiting the sale of liquor shall continue in full force for twenty-five years, etc., cannot be considered a contract. The Nez Perce tribe, as an entity, was destroyed by the very terms of this agreement. The agreement does not purport to run for the benefit of the individual Indians, and if it

could be so construed would be contrary to public policy as a restraint upon the Government's police powers.

Fourth. The constitution of the State of Idaho, section 19, article 21, provides, among other things, in effect, that all lands owned or held by Indians or Indian tribes, *until the title thereto shall have been extinguished* by the United States, shall remain under the absolute jurisdiction and control of Congress.

By act of Congress approved July 3d, 1890, Idaho was admitted as a State.

Section 1 of said act provides, among other things, that the constitution as formed by the citizens of Idaho is *accepted, ratified, and confirmed.*

Section 2 defines the boundaries of the new State. No reservation is made of any portion of the Territory, excepting as expressed in the constitution, the ratification of which by Congress amounted to a sacred compact between the United States and the State of Idaho, granting to the State exclusive jurisdiction for all purposes of local police control over all territory included within its definite boundaries, excepting only lands belonging to Indians or Indian tribes, and this restriction to extend ONLY UNTIL SUCH TIME AS THE INDIAN TITLE SHOULD BE EXTINGUISHED.

It will be particularly noted that there is nothing in this contract between the United States and the State of Idaho that contemplates any such thing as a divided sovereignty. The jurisdiction over lands embraced in Indian reservations or belonging to Indian tribes shall remain under the *absolute jurisdiction and control of Congress* until the Indian title is extinguished.

There can be no question but what the United States could have retained its absolute jurisdiction for any length of time over these lands so reserved, and that it was entirely optional with the Government, acting through its Congress, to determine when it would release its control over the In-

dian reservations by the extinguishment of the Indian title But it was not in the power of Congress to turn over to the State of Idaho a partial and divided jurisdiction and sovereignty over these lands. It could not ask or require the State of Idaho to assume the responsibility of a divided jurisdiction and partial police control. It had authority only to retain absolute jurisdiction and control, or, by the extinguishment of the Indian title, to grant absolute jurisdiction and control to the State of Idaho.

It is conceded by the honorable solicitor general, and is conclusively shown by the record, that the Indian title has been extinguished to the lands included in the former Nez Perce reservation, including the territory embraced by the said village of Culdesac, and that the same has been granted by the United States to citizens of the State of Idaho without any restrictions.

It will be noted that this agreement was concluded with the Nez Perce Indians on May 1, 1893, long after Idaho had been admitted as a State.

The commissioners who concluded that agreement were appointed pursuant to the act of February 8, 1887 (24 Stats., 388), and under that statute were given no power whatever to insert such a provision in the agreement with the Indians.

It was contemplated by the very act under which the negotiation was authorized that the purpose of the negotiation should be to bring about the dissolution of the tribal relations of the Nez Perce Indians by allotting them lands in severalty, by the acceptance of which under the terms of said act they were to become citizens of the United States and subject to all the laws of the State of Idaho, both civil and criminal. It was contrary to the purpose and spirit of this act as well as to the policy of the Government that any restrictions should be placed either upon the responsibility of the Indians to the State or upon the control of the State over the Indians after the acceptance by him of his land in severalty.

Article V of the said agreement with the Nez Perces provided that the lands should not be open for settlement until the trust patents were issued and recorded, and it was evidently intended that the public should not be invited to settle upon the said reservation until such time as, under the law, the control and police jurisdiction over such reservation should pass from the Government of the United States to the government of the State of Idaho.

By the act of August 15, 1894, 28 Stats., 332, ratifying the said agreement, it is provided that immediately after issuing the trust patents the lands ceded shall be open for settlement and shall be subject to disposal under the land laws of the United States.

It does not seem to have been contemplated that the said article IX inserted in said agreement, relating to the introduction of intoxicating liquors, should be considered in any sense as a part of the consideration for the sale of the lands by the Indians. All of the several articles of the agreement providing for valuable considerations which should pass to the Indians were introduced with the clause, "It is hereby stipulated and agreed." Article IX, relating to the introduction of intoxicating liquors, as well as article X, relating to the payment of certain claims to Indians on account of service under General Howard, were introduced with the clause, "It is agreed." We think it is fair to presume that the Indians, or at least their intelligent advisers, understood that the commissioners had power only to recommend that these latter provisions be carried into effect and had no power to bind the Government in relation thereto.

However this may have been, Congress clearly was without power, in an act ratifying an agreement with the Indians or in any other way by any legislation, to violate the existing compact between the State of Idaho and the Government of the United States, or to divide the sovereignty for the purpose of police control over the territory ceded between the Federal and State governments.

The foregoing considerations, it seems, conclusively determine the fallacy of the Government's position that there is a question here of impairment of the contract with the Nez Perces.

These broad constitutional questions, clearly decided *In re* Heff, *supra*, are absolutely controlling as to the law upon the issues involved herein. Jurisdiction for the purpose of regulating the sale of liquor by a citizen of a State to a citizen of the same State belongs exclusively to the State and not to the United States; that in matters of police control there can be no such thing as a divided sovereignty; that jurisdiction belongs either to the State or to the United States, and cannot be divided between the two.

As we understand, the honorable solicitor general substantially concedes that to give the said agreement with the Nez Perces effect would divide the sovereignty for the purpose of police control over the territory embraced in the Nez Perces reservation between the State and Federal governments, but argues that it is within the power of Congress to do this, and that the decision of this court in the matter of Heff is not controlling.

We understand the decision of this court *In re* Heff, *supra*, to be explicit upon the point that there can be no exception to the rule; that a divided sovereignty for the purpose of police control is an impossibility under our system of government. This court in its decision, pages 506 and 507, *In re* Heff, *supra*, states the reason for this rule and cites The Kansas Indians, 5 Wall., 537, holding the Indians must be wholly subject to the United States until clothed with the rights and bound by all the duties of citizens, and United States *vs.* Dewell, 9 Wall., 41, holding that a police regulation embraced in an act of Congress can only have effect where the legislative authority of Congress excludes territorially *all State legislation*.

An examination of the brief of the honorable solicitor general in the Heff case, as well as the decision of the court

therein, shows that all the matters now urged by the honorable solicitor general in favor of the jurisdiction of the United States over the former Nez Perce reservation were substantially urged in the former case and were in that case explicitly passed upon adversely to the Government's position.

We conclude that under the petitioner's showing and under the conceded facts there is no such controversy as will warrant this court in issuing the writ of certiorari; that the record shows that the district court was wholly without jurisdiction, and that its judgment of conviction of the respondent of the offense was wholly void and the imprisonment of respondent thereunder illegal and wholly without authority of law, and that he was entitled to his discharge; that whether the Circuit Court of Appeals had or had not jurisdiction to issue the writ of *habeas corpus* that this court should not exercise its discretionary power to bring up such proceedings of the Circuit Court of Appeals for review, when it is manifest that in no event, under the conceded facts, could the respondent be remanded to imprisonment, and that because of these considerations the writ should be denied.

Respectfully submitted.

FRANK E. FOGG,
Attorney for Respondent.

BRIEF
FOR
RESPONDENT

FILE COPY.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 494

E. L. WHITNEY, Warden of the Idaho State Penitentiary,
Appellant.

vs.

GEORGE DICK,
Respondent.

No. 557

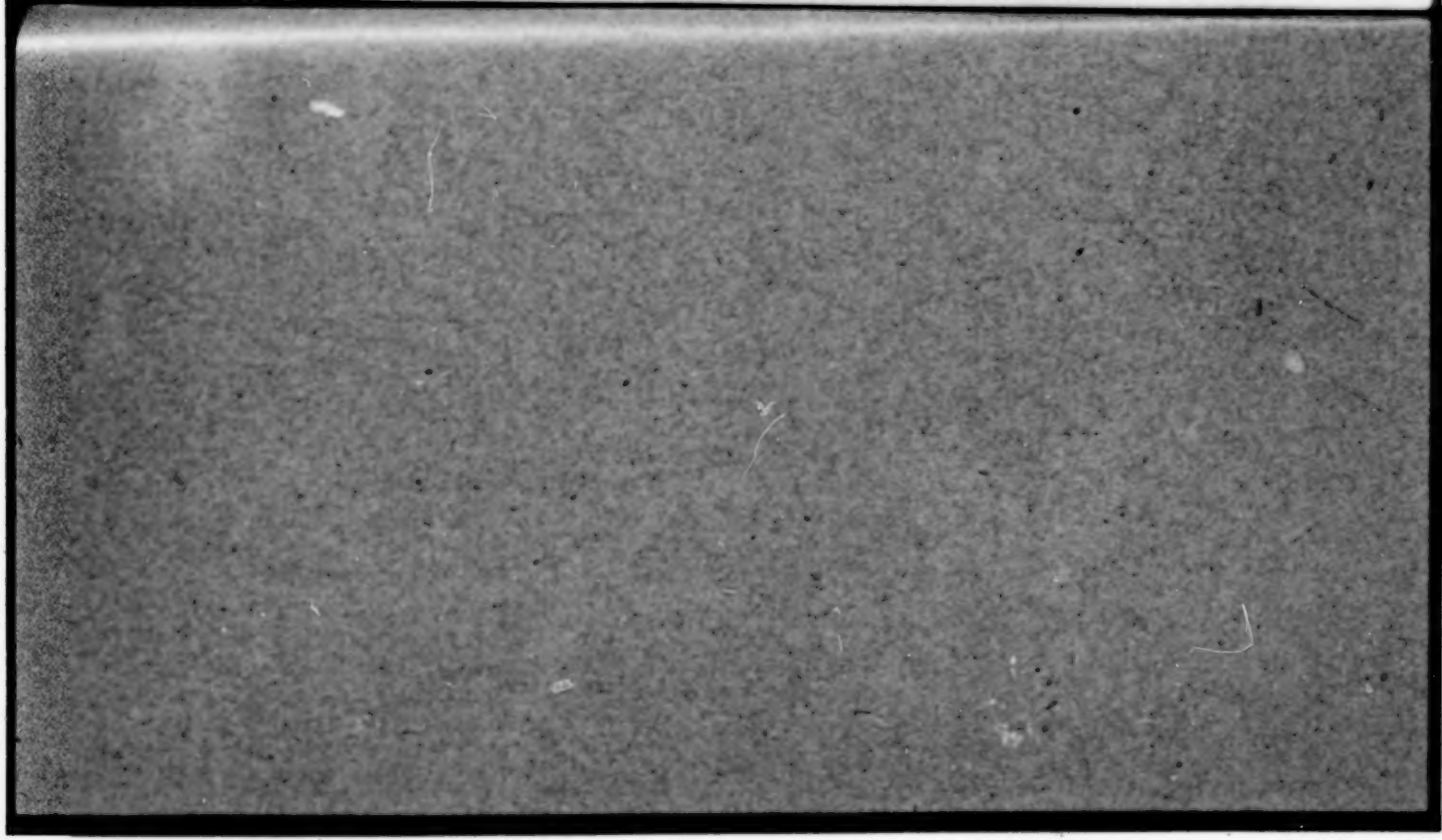
E. L. WHITNEY, Warden of the Idaho State Penitentiary,
Petitioner.

vs.

GEORGE DICK,
Respondent.

BRIEF OF RESPONDENT

FRANK E. FOGG,
Attorney for Respondent.



IN THE SUPREME COURT OF THE UNITED STATES

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E. L. WHITNEY, Warden of the Idaho State Penitentiary,
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BRIEF OF RESPONDENT

An order of this court having been made that the record in No. 494, this term, shall stand as the return to the Writ of Certiorari, issued in No. 557, and that both cases are advanced to be submitted on printed briefs, the respondent, believing that the issues in both cases are so nearly identical as to render their separate treatment unnecessary, asks the Court to consider this brief in each of the above named cases.

The questions involved in the case made upon the return to the Writ of Certiorari, as well as upon the appeal, were discussed in the brief heretofore filed by the respondent in opposition to the petition for the Writ of Certiorari, and I shall avoid as far as practicable, duplication of the points covered in that brief, and will submit the present brief as supplementary thereto.

Herein, I will first discuss the leading question involved: Has the United States jurisdiction for the purpose of local police control over territory within a state owned in fee by white citizens of such state, and not reserved for use and occupancy by Indians, nor for any government purpose whatsoever.

I shall assume, as I am confident the record fully warrants, that this question was squarely presented by proceedings clearly within the jurisdiction of the Circuit Court of Appeals, and is now properly before this Court for review.

Following this I shall briefly and specifically direct the attention of the Court to such matters, shown by the record and transcript herein, as may be necessary to fortify my position as above stated.

The Honorable Circuit Court of Appeals, in the decision in the case at bar, (Transcript, page 42) said:

> In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the State and outside the jurisdiction of the United States. With respect to such a case the Court in the case of Heff, supra said: "It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecendent status of either buyer of seller was. There is in these police matters no such thing as a divided sov-

ereignty. Jurisdiction is vested entirely in either the State or the nation, and not divided between the two." This statement of the law by the Supreme Court we think disposes of the present case.

I believe that the broad constitutional question decided in re Heff, 197 U. S. 505—that there can be in police matters *no such thing as a divided sovereignty,* is absolutely controlling in the case at bar, and that the respondent's case might well be submitted upon the simple statement of the foregoing proposition.

But in the present case there are even stronger reasons than were presented in the matter of Heff, supra, for denying to the United States jurisdiction in the premises.

In the matter of Heff, this Court based its decision upon the unconstitutionality of the act of January 30, 1897, 28 State. L. 506, in as far as that act attempted to control the sale of liquors to an Indian, to whom an allotment of land has been made, and who, by the act of receiving such allotment, had become, under the laws of the United States, a citizen of the United States, and of the state wherein he resides. While in the case at bar, I contend that even if the statute could be held constitutional the acts charged do not constitute an offense under the statute.

The indictment, conviction and commitment of the respondent, Dick, are founded upon the charge of introducing liquor in the village of Culdesac, an incorporated village within the State of Idaho. There is no dispute about the fact, indeed, there could be none, as the District Court of Idaho, as well as the Circuit Court of Appeals, and this Court we apprehend, takes judicial knowledge of the location of an incorporated town, and that under the laws of the United States, lands reserved for the use and occupation of Indians, or for any government purpose, could not be included within a patent of the United States to the inhabitants of a town under the townsite laws.

The Circuit Court of Appeals says: (Page 40-41 Transcript.)

> The Village of Culdesac is located upon land ceded to the Indian by the United States, about six or seven miles from the exterior boundary of the Indian School Reservation, and no reservation or any part of a reservation used for government purposes, or for Indian purposes is within the boundaries of such village. Prior to the transaction involved in this case the title to the lands upon which the village of Culdesac is located had passed from the United States by patent under the townsite laws to the Probate Judge of Nez Perce county, Idaho, in trust for the inhabitants of the village.

The respondent was indicted under the provisions of 29 Stat. L. 506, for introducing liquor into and upon the Nez Perce Indian reservation. (Transcript, page 12.) It will be noted that the charge is for introducing, not for the selling of liquor, and that the general allegation that the place to which the liquor was introduced was Indian country is controlled by the specific statement that it was upon the Nez Perce Indian reservation; but the Indian title to the Nez Perce reservation had long since been extinguished, and the territory formerly embraced therein consisted either of lands patented in fee to the settlers under the homestead and townsite laws, or of Indian allotments, or of public lands of the United States. These are facts of which the Court necessarily takes judicial knowledge, and unless the entire former Nez Perce reservation is to be deemed Indian country, within the terms of the statute upon which the prosecution was predicated, then the indictment charges no public offense.

The statute provides, among other things, as follows:

> Any person who shall introduce, or attempt to introduce any malt, spirits, or vinous liquors, * of any kind whatsoever, into the Indian country, which term shall include any Indian allotment, while the title to the same shall be held in trust by the government, or while

the same shall remain inalienable by the allottee, without the consent of the United States, shall be punished, etc.

29 Stat. L. 506.

This statute is subsequent to the act of congress ratifying the agreement with the Nez Perces, by which it was attempted to retain jurisdiction over the lands ceded by the Nez Perce Indians for the purpose of regulating the sale of intoxicating liquors, and amends the then existing laws, in so far as inconsistent in its provision. The fact that Congress provided that the term "Indian Country" should include any Indian allotment while the title to the same should be held in trust by the government would indicate that that term as used in that act, was not deemed sufficiently broad to include land with which the government had parted with title, even though it be held in trust for the Indian, and, *a fortiori* must the term "Indian country," have been used in a sense excluding entirely lands that the government had patented to white citizens without any restriction whatsoever. Therefore, it seems to me that by the very terms of the act under which the respondent was charged, even if the same could be held constitutional, that the lands included within the Village of Culdesac, the title to which had passed from the United States without restriction, are excluded from the term "Indian Country", as contained in said act.

There can be no doubt that the effect of the act of January 30th, 1897, 28 Stat. L. 506, is to amend the laws existing at the time of the agreement of May 1, 1893, with the Nez Perces, in relation to the prohibition of the introduction of intoxicating liquors into the Indian country, by providing a definition of the term Indian country, which by specifically including any Indian allotment while the title to the same shall be held in trust by the government, thereby excluded the idea that the term "Indian Country" includes lands of which the title had passed by government patent to citizens of the state without restriction. This act is of general ap-

plication, and the Nez Perce Indian reservation is in no manner excepted from its provisions. It cannot be successfully maintained that congress, by the act of ratifying the agreement with the Nez Perces, could place any restrictions upon future legislation, amending or even abrogating the existing law in reference to the prohibition of the introduction of liquor.

The plenary power of Congress over tribal relations and lands cannot be limited by provisions of treaty so as to preclude future enactments, giving effect to the government policy in relation thereto.

Lone Wolf v. Hitchcock, 187 U. S. 553.

A brief consideration of the principles upon which this Court decided, in the matter of Heff, that the act of 1897, 29 Stat. L. 506, was invalid, is as far as it attempted to regulate the sale of liquor to an Indian who had become a citizen, I think will lead to the conclusion that it is equally invalid in as far as it is attempted to apply it to prohibit the introduction of liquor for the purpose of commerce with citizens at any place where the government has parted with its title to the citizens of the state without any restriction.

This Court, in a line of decisions reaching from a period of nearly a century, has based the power of the Federal government to legislate in reference to the sale of liquor to Indians solely upon the provision of section 8, article 1, of the Constitution, granting to Congress power "to regulate commerce with foreign nations, and among the several states, and with Indian tribes."

For the purpose of giving effect to this provision of the Constitution, Indian tribes were considered as standing in a similar position to foreign nations, and members of Indian tribes were treated in analogy to citizens of a foreign country.

As long as the tribal relations were maintained, this Court has repeatedly held that Congress, under this provision of the Constitution, had power not only to prohibit the sale of liquor within the Indian country, but to members of the tribes outside of the Indian country, and in United States v. Forty

three Gallons Whisky, 93 U. S., 198, held that congress had power to exclude spiritous liquors not only from Indian countries, but from that which has ceased to be so by reason of its cession to the United States, but being within territory in proximity to that where the Indian lived. This case is cited by the Honorable Solicitor General in his brief accompanying his petition for certiorari, and is relied upon as sustaining his position that the United States has jurisdiction in the case at bar. It will be noted, however, that that the authority of Congress in that case is predicated entirely upon the clause in the constitution relating to the regulating of commerce with Indian *tribes*. The Court in that case, referring to United States vs. Holliday, 3 Wall, 409, which is followed, says:

> But this Court held that the power to regulate commerce *with Indian tribes* was in its nature general and not confined to any locality, that its existence carried with it the right to exercise it *whenever there was a subject to act upon*, although within the limits of the state, and that it extended to the regulation of commerce with the individual members of such *tribes*. * * * * *

The Court then proceeds to apply these principles to the case under consideration, as follows:

> As long as the Indian remains a *distinct people with the existing tribal organizations*, recognized by the Political Department of the Government, Congress has power to say with whom and on what terms they shall deal, and what articles shall be contraband.

The Court in this case also cited Worcester v. Georgia, 6 Pet. 515, and commenting upon that case says:

> Chief Justice Marshall, in this case with force of reasoning and extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived, and this exposition was *based on the power to make treaties and regulate commerce*

> *with the Indian tribes*, * * * * * and Congress has now the exclusive and unfettered power to regulate commerce with the *Indian tribes*, a power as broad as to regulate commerce with foreign nations.

In a decision sustaining the constitutionality of the act of 1862 amending the act of June 30th, 1834, 4 Stat. U. S. 732, prohibiting the sale of spiritous liquors to an Indian under the charge of an Indian agent, this Court said:

> The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any *Indian tribe* or any person who is *a member of such tribe* is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the *Indian tribes*.
>
> United States v. Holliday, 3 Wall. 407-420.

The only essential point decided in Bates v. Clarke, 95 U. S. 204, also cited by the Solicitor General, is that all the country described by the act of 1834 as Indian country, remains Indian country so long as the Indians retain their title and right to the soil, and ceases to be Indian country whenever they lose their title, in absence of any different provision by treaty or by act of Congress. And in this case the Court holds that the territory upon which the liquor was seized had ceased to be Indian country as soon as the Indians parted with title, without any further act of Congress.

And in this case the Courtt distinguished its decision in United States v. Forty-three Gallons Whisky, supra, as follows:

> While the Court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the In-

> dians, it remains Indian Country until they remove from it. The whole opinion goes upon the hypothesis that when the Indian title is extinguished, it ceases to be Indian Country, unless some such reservation takes it out of the rule.

It will be noted that the treaty with the Red Lake and Pembina band of Chippewa Indians, ceding to the United States a portion of their land was concluded on October 2, 1863, and it was under this treaty and under the condition then existing, and under the policy then pursued by the United States in the government of Indians, that the decision in United States v. Forty-three Gallons Whisky, supra, was based.

The distinction between that case and the case at bar is apparent and well defined. There was nothing in that treaty looking to the dissolution of the tribal relation of the Indians, the tribes remaining intact, and at that time the policy of the Government was to deal with the Indians by treaties, and as a people distinct from the citizenry of the nation.

By the act of March 3, 1871, 16 Stat. L. 556, it is provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty.

Referring to the act of Congress above quoted, this Court has said:

> After an experience of one hundred years of treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress.
>
> United States v. Kagama, 118, U. S. 375.

And in the matter of Heff, 198 U. S., page 498-499, says:

> From that time on, the Indian tribes and individual members thereof, had been subject to direct legislation of Congress, which for some time thereafter continued the policy of locating the tribes of separate reservations, and perpetuating the communal of tribal life. * * * * Of lete years, a new policy has found expression in the legislation of Congress, a policy which looks to the breaking up of tribal relations, the establishing of separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States."

It is under these later conditions, and the present policy of the government, and of Congress, that we must view the statute under which the respondent was convicted—interpret and construe it in reference to the agreement of May 1, 1893, with the Nez Perces; test its constitutionality, and weigh the power of Congress to reserve partial sovereignty within the former Nez Perce reservation.

The very effect and purpose of the agreement of May 1, 1893, with the Nez Perces was to break up the tribal relations; to dissolve the tribal entity; to do away with the last remnant of inter-tribal customs, government, and police control; to remove the very machinery of government supervision and control, and renounce the guardianship of the goernment over the persons of the Indians; to renounce as well anything like a general guardianship over even the property of the Indian—the Indian being left free to hold property and contract for himself in reference thereto, save a restriction upon the alienation of land patented to him by the government.

In fact, the Government of the United States, by the very act of ratifying the said agreement with the Nez Perces, not only renounced its guardianship of the person and general property of every Indian of the former Nez Perce tribe, but practically destroyed the very machinery by which the Indians could govern themselves.

Unless the sixteen hundred Indians immediately become full citizens of the state of Idaho, and, in fact, subject to all its laws, both civil and criminal, upon the acceptance of land in severalty, as provided by the act of February 8, 1887, then they are without government or means of government; their political and civil status an anomaly suspended in the air between the sovereignty of the state and the sovereignty of the nation.

The Honorable Solicitor General, as we understand his argument, contends that there can be such a thing as qualified citizenship—that is, that it was competent for Congress to confer upon the Indians such citizenship as would entitle them to all the rights of citizens of the state where they were located, and at the same time, deny to the state the right to subject them to the same complete and exclusive police control that it may its other citizens.

> Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the supreme court, in an opinion written by Mr. Justice Bradley, has said: "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected." Civil Rights Cases, 109 U. S. 25.
>
> In Celestine, 114 Fed. 551-553.

We are entitled to presume that the political department of the government, before alloting the land in severalty to the Nez Perces, and thereby conferring upon them the rights and corresponding responsibilities of citizenship, had

determined that the members of that tribe were sufficiently advanced in civilization to be safely intrusted with the immediate duties and grave responsibilities concomitant with such a status.

In fact, the Nez Perces are perhaps among the most enlightened and intelligent of the Indian tribes.

Even if the reverse were true, Congress was without power under the constitution to renounce the government duty of police control of these people, to break up their tribal relations, and distribute them among the white citizens of Idaho, clothed with all the rights of ordinary citizens and freed from the restriction of government control, and, at the same time, to deny to the state the same full control it has over its other citizens.

The Supreme Court of Kansas, in a recent case, cited with approval by this Court, in re Heff, supra, says:

> Congress, by authorizing the leasing and the sale of lands by the allottees with the approval of the secretary of the interior, encouraged the whites to go among the Indians and upon their lands, not with the view of benefitting the white man, but with the view of giving to the Indians better environments and developing their lands. We are not to presume that Congress would encourage the white man to go with his family among and upon the lands of the Indian for the benefit of the Indian, and not protect him, his family, and his property against the depredations and lawlessness of the Indian, unrestrained other than by the laws of the tribe to which he belongs. * * * * * * It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen, and, aside from those crimes specifically mentioned in the act of March 3, 1885, be restrained only by a code of laws based upon the primitive ideas and

standards of a tribal council. An Indian upon whom has been conferred citizenship and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated.

In re Now-goe-Zhuck, 76 Pacific, 877-880.

This reasoning of the Supreme Court of Kansas is peculiarly applicable to the condition of the Nez Perces existing at the time of the allotment, and since developed upon their former reservation.

The Nez Perce reservation consisted of over thirty townships, or something like 700,000 acres of land.

The reservation was at this time, and for many years prior thereto has been, surrounded by settled communities. The Indians for years had mingled freely with the white settlers. Practically all the younger Indians were versed in the English language. Probably a majority of the Indians had adopted the Christian religion, and, as a whole, the tribe was far advanced in civilization.

The topography of the reservation is peculiar. The Clearwater river traverses the reservation in a northeasterly direction for nearly seventy miles. The general elevation above sea level of the valley of the Clearwater is from six to seven hundred feet. Lying west of the Clearwater valley, at an altitude of nearly 3,000 feet above sea level, is a level plateau of prairie lands, having an area of several hundred thousand acres.

The Indians were in actual occupancy only of the river valley. Practically none of the Indians ever lived upon or occupied the high lands.

Upon the taking of allotments in severalty, the Indians selected for their homes the low lands in the valley of the Clearwater and its tributaries. It is true several hundred allotments were taken upon the high prairie lands, but with perhaps less than a score of exceptions, these lands have never

been occupied by Indians as homes, but have been leased to the whites. The Indian owners continued to live in the settlements along the river.

Since opening the ceded lands for settlement in November, 1895, practically all of the ceded lands have been located under the homestead and townsite laws, and a large portion thereof has since been conveyed by patent to the settlers without any restriction whatever in the patent against the use and occupation of the land for any purpose.

The white population upon the ceded lands within the former reservation today numbers little less than 10,000 people. There are several towns thereon incorporated under the laws of Idaho, among which are Nezperce, with a population of one thousand, Culdesac, Stites, Kooskia, Peck, Ilo, Mohler, Orofino, Kamiah, Gifford and a number of other towns and villages each having a population of several hundred people.

The upland plateau I have mentioned is now practically a vast grain field of several hundred thousand acres producing annually six or seven million bushels of grain.

Congress must have anticipated such results from the opening of this vast territory to settlement. It is but the repetition of many a like chapter inthe history of the settlement of the fertile prairie lands of the west.

It is no longer a question of the government protecting the Indians and feeble frontier settlements of whites from the demoralization and danger of the intoxication of savages.

The Nez Perce Indians of today as a whole, are not so much worse than their white brothers in their tendency to use intoxicating liquors to excess. I believe I am entirely conservative in saying that there are not exceeding one hundred Indians among the entire band of Nez Perces who drink liquor to an extent to cause any serious injury to themselves, or any annoyance to the white settlers.

The motive for establishing saloons upon the reservation is not at all for the purpose of engaging in traffic with the

Indians, but for the purpose of furnishing liquors desired by the white settlers for mechanical and medicinal purposes, and as a beverage. It is safe to say that not 3 per cent of the liquors introduced upon the former Nez Perce reservation are consumed by Indians.

It is not a question of regulating commerce among the Indian tribes, for there are no Indians here living in tribal relations, nor even is it to any controlling degree a question of commerce with individual Indian citizens, but it is essentially and pre-eminently a question of regulation of the liquor traffic among the white citizens of the state.

The danger of any encroachment upon the system of independent local self-government contemplated by our constitution is well illustrated by the conditions prevailing in the former Nez Perce reservation prior to the decision of the Circuit Court of Appeals in this case, holding that the state had jurisdiction in the premises.

In every town and even in every little hamlet and crossroad throughout the reservation were men engaged in the illicit sale of intoxicating liquors. The government, from the fact that it has no organized system of local police or constabulary, has been powerless to suppress or even regulate this traffic. In many instances, the men engaged in this traffic were criminals of the worst type, and their places of business, commonly called "boot-legging joints" were the headquarters of gamblers and criminals, and breeding places of vice.

Since the decision of the Circuit Court of Appeals, the state has assumed jurisdiction over this territory and brought the same within its system of high license control. The boot-legging joint has entirely disappeared, and in its place is the licensed saloon, subject to constant inspection and control by the local police officers of the state, and of the municipality wherein such saloon is located.

Thus, the Indian shares with the white citizen a better and healthier condition of civic life under state control.

I have referred to the history and conditions of the Nez Perces perhaps to an extent that might seem to go beyond the matters shown by the record herein. I am induced to do so partly from the fact that the Honorable Solicitor General, in the brief accompanying his petition for certorari, page 27, quotes freely from the report of the Commissioner of Indian Affairs, in reference to some of these matters, and principally because I deem all the matters of fact that I have stated to be matters of history, and general public knowledge within the districts of Idaho, of which the United States courts may take judicial knowledge, and because the considerations I have suggested in connection with the agreement with the Nez Perces, and the various acts of Congress in the premises, show conclusively that it must have been the intention of Congress to terminate the tribal relations with the Nez Perces, and that the effect of all this legislation has been to bring about a state of affairs entirely inconsistent with the idea that the political department of this government still retains any such general control over the persons of the Indians as is inconsistent with the intention of Congress to renounce entirely its guardianship over the persons of the Indians.

I could not better illustrate the reverse conditions upon which the earlier decisions are based sustaining the jurisdiction of the United States over Indians, than by quoting the views of this court expressed in an opinion by Mr. Justice Miller, in a decision sustaining a conviction in the United States Court of an Indian of the crime of murder, wherein the tribal status of the Indian and consequent non-allegiance to the state are clearly made the controlling consideration.

> Its effect (the statute under consideration) is confined to the *acts of an Indian of some tribe*, or a criminal character, committed within the limits of the reservation. It seems to us that this is within the competency of Congress.
>
> These *Indian Tribes* are the wards of the Nation. They are communities dependent on the United States;

dependent largely for their daily food; dependent for their political rights. *They owe no allegiance to the States and receive from them no protection.* Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court whenever the question has arisen."

United States v. Kagama, 118 U. S. 375-385.

In the brief file in No. 557, in oposition to the application for the writ of certiorari herein, at pages 12-13, I suggested that the provisions of Section 19, Article 21 of the Constitution of the State of Idaho, providing, in effect, that the jurisdiction of the United States over the lands owned by Indians and Indian tribes should continue only until the Indian title thereto should be extinguished, as expressly ratified by act of Congress of June 3, 1890, admitting Idaho as a state, amounted to a compact between the United States and the State of Idaho granting the state exclusive jurisdiction over such Indian reservations for all purposes of police control, *as soon as the title should be extinguished*; and that, inasmuch as by the subsequent agreement of May 1, 1893, with the Nez Perces, as ratified by act of Congress, August 15, 1904, 28 Stats. 332, the Indian title was extinguished, Congress was without authority to reserve jurisdiction over the land ceded after the *Indian title had been extinguished*, especially after the title thereto had, as in the case at bar, passed from the United States to citizens of Idaho under the townsite laws, without any restrictions in the government patent.

Upon this point, this court, in a case involving the construction of similar provisions in the Constitution of the

State of Montana, and in the act of Congress admitting that state to the Union, has said:

> In February, 1887, by a general law, congress provided for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes. 24 Stat. 388. The act in question contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty. It provided in Sections 6 'that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' But the act at the same time put limitations and restrictions upon the power of the Indians to sell, incumber, or deal with the lands thus to be alloted. * * From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise, where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the *power of the state to frustate the limitations imposed by the laws of the United States upon the title of lands* once in an Indian reservation, but which *had become extinct by allotment in severalty*, and in which contingency the *Indians themselves would have passed under the authority and control of the state.*

Draper v. United States, 164, U. S. 240.

And in discussing the act of Congress admitting Colorado into the Union as a state, this court has said:

> The act of March 3, 1905, necessarily repeals the provisions of any prior statute or of any existing treaty which are clearly inconsistent therewith. Case of the Cherokee Tobacco, 11, Wall. 616. Whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. * * * * * * * The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indian in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians.
>
> United States v. McBratney, 104, U. S. 621-624.

Applying the principles declared by this court in Draper vs. United States, and in United States vs. McBratney, supra, to the question of jurisdiction of the United States over lands ceded by the Nez Perces, the jurisdiction of the United States would be limited to the protection of the lands allotted from alienation or encumbrance, and incidentally, perhaps, the protection of the improvements upon said lands, for, as suggested in Draper v. United States, the Indians themselves, by act of taking allotments in severalty under the provisions of the law of 1887, have passed under the authority and control of the state, and are subject to its laws, both civil and criminal, and therefore, crimes committed by or against Indians are to be punished the same as crimes committed by or against the white citizens, and all questions of the government and internal police of the Indians become inapplicable, as such functions cannot properly be exercised by the United States over citizens of the state in their intercourse and commerce with each other within the state.

The United States v. Rickert, 188, U. S. 432, cited by th Honorable Solicitor General, is clearly distinguished by this court in re Heff, in as far as it was relation to the

issues in the case at bar. What is said therein in reference to the Indians being wards of the government, when read in light of the entire decision, only goes to the extent of a special guardianship for the purpose of protecting the lands alloted and the personal property given the Indians by the government to aid them in adopting the ways of civilization. There is nothing in that decision that suggests that the government retains any control over the person of the Indians after they become citizens. It is with this latter question, and not with the property rights of Indians, that the case at bar has to do. In this case the introduction of the liquor was not upon an Indian allottment, but upon lands admitted to be owned in fee by white citizens of Idaho

SUMMARY OF MATTERS SHOWN BY TRANSCRIPT OF RECORD.

The petition for Writ of Habeas Corpus and Certiorari sets up all of the proceedings in the District Court upon which the imprisonment of the pettitioner is based. (Transcript, pages 1-12.)

The ground for relief is stated generally as follows: (Transcript, Folio 2, page 2.

That the indictment did not charge a public offense, or establish a violation of 29 Stat. L. 506, "and that the said statute in as far as it assumes to punish as an offense against the laws of the United States, the bringing of liquor within the limits of this state, and not reserved by the government for the exclusive use of Indians, is unconstitutional and void; and for the further reason that the court has no jurisdiction of the subject matter of the offense charged, or attempted to be alleged in the indictment, or over the person of the defendant for the reasons above stated."

The petition, (Transcript, folio 5-10, pages 2-5) in detail, be reference to the pleadings, evidence and instructions of the court, shows: that it is a conceded and uncontro-

verted fact that the only act done by the petitioner upon which the conviction and imprisonment of the defendant was based, was to buy a bottle of whiskey in the Village of Culdesac, and deliver it at the door of the building of a Nez Perce Indian, who had theretofore taken his land in severalty, and to whom a trust patent had issued; and that in no wise in any of the proceedings in the District Court was the claim made that the indictment was founded upon any other transaction, than as before stated, nor that any other state of fact was proven, nor any other issues submitted to the jury, nor that there was any claim, or pretense even, that Culdesac is upon lands reserved for any Indian or government purpose, or that said village is even upon an Indian allotment.

The petition further shows that the petitioner in the District Court protested against these proceedings, and challenged the jurisdiction of the court at every step upon the identical grounds urged in his petition for habeas corpus and certiorari:—by demurrer to jurisdiction, exhibit "B", Folio 15, page 7; by obection to the introduction of evidence, folio 4; (see also folio 50, page 24) by rejquests for instructions and exceptions to the charge of the court, folio 6; (see also folio 56, pages 27-28) and by motion in arrest of judgment, exhibit "D," folio 19, page 9.

The petition further says (Folio 11, page 5:

> For the foregoing reasons and for the further reason that the Hon. James H. Beatty, judge of the United States District Court for the district of Idaho, under whose jurisdiction your petitioner is now confined and restrained of his liberty, has passed upon all the questions presented and raised by this application, holding against the contention of your petitioner, making such application to the distret judge a useless procedure and on account of the delays incident to appeal therefrom, your petitioner has no plain, speedy, or any adequate remedy at law, therefore this application is presented direct to the Hon. United States Circuit Court of Appeals."

Petitioner prays (folio 11, page 5) for writ of habeas corpus, and for writ of certiorari.

The theory upon which the petitioner was tried and convicted is clearly shown by the opinion of the Honorable District Judge overruling the demurrer to the jurisdiction of the court, and in the instructions to the jury.

The opinion in no wise suggests that a clear issue of law is not presented challenging the jurisdiction of the Court, and upholds the indictment and retains jurisdiction solely upon the grounds that the *entire* former Nez Perce reservation is still Indian country, and that *all* the Nez Perce Indians are still wards of the government and not citizens, notwithstanding, it is conceded that they have received allotments in severalty. The court says (Transcript, folio 71, page 35):

> "It leaves *the entire reservation* and *all the Indian allottes* thereof for 25 years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these *provisions of the act of* 1887 *are not applicable to the Nez Perce to the laws of the state, but are* still the wards of the nation at least so far as concerns the laws regulating the sale of intoxicants."

The entire instruction given to the jury was as follows, (Transcript, folio 55, page 27):

> Gentlemen: The only instruction I need to give you is this: If you find that the defendant had this bottle of whiskey upon him *within the limits of what is known as Nez Perce Indian Reservation*, then you are to find him guilty of this charge. The charge, of course, is for *introducing liquor into the reservation*, but I instruct

you that having it in his possession upon the reservation *is conclusive.* When and where he bought it is immaterial; that it was in his possession within the limits of the Indian reservation is sufficient. *I instruct you as a matter of fact, that Culdesac is within the limits of the reservation.*"

The opinion of the learned District Judge, as well as the instructions to the jury, not only settles the question that the *locus in quo* of the alleged offense charged in the indictment, as well as the facts of the transactions relied upon to support the jurisdiction of the court are, and were conceded by the government at every step of the proceeding to be, as we have herein contended; but it does more, we are brought face to face with the startling proposition that the *act of 1887 is not applicable to the Nez Perce Indians,* and that they are *neither citizens nor subject to the laws of the state.*

Not subject to the laws of the state! Then to what laws are they subject? The tribal community has been disolved, the government no longer maintains any machinery to police the reservation; the Indians are left free to roam at will; ten thousand white settlers, at the invitation of the government, have settled upon the former reservation. Where, if not in the state, is vested the jurisdiction and the power to protect the family and property of these citizens of Idaho?

But to analyze the charge of the Court. The jury is told that "the charge—of course, is for *introducing liquor* upon the reservation, but I instruct you that having it in his *possession* upon the reservation is *conclusive.*"

It would seem to me that this not only denies to the defendant the presumption of innocence, but denies him even the right to prove his innocence.

In fact, the evidence offered by the government shows affirmatively that the defendant did not introduce the liquor, and that the only dominion or control that he exercised over the whiskey either directly or indirectly, was to purchase the same at a certain place within the town of Culdesac, and

immediately dispose of the same there. (Transcript, folio 51, page 25; folio 53-54, page 26.)

It will be noted that the defendant was not charged with *selling* or *giving* the liquor to Indians, but of *introducing* liquor into the Indian country.

The petitioner himself is a Umatilla Indian, and the Indians with whom he divided the liquor were Nez Perces who had taken allotments in severalty.

For the offense of being sociable with his Indian fellow citizens, the Umatilla Indian, Dick, the petitioner herein, is now serving a term in the Idaho Penitentiary.

Thus, if the governments's position as to the status of Indian allottees be true, does the benificent guardian and instructor tenderly wrap the the mantle of protection around the Indian ward and pupil.

Again, to apply the doctrine of the learned District Judge to the ten thousand white settlers within the former reservation, each and every one of them who may have a half pint of wine or brandy in their possession, whether it is for medicinal or household use, or for however needful, innocent, or lawful purpose, is *conclusively presumed* to be *guilty*, and may be sent to the penitentiary.

The conclusion to which this contention leads is an efficient demonstration of the fallacy of the government's provision that congress intended the act of 1897, 29 Stat. L. 506, under which petitioner is imprisoned, to apply to the lands patented to white settlers. It certainly is a striking illustration of the confusion and anomoly to which a divided sovereignty in matters of police control may lead.

Yet, the petitioner by the application of such doctrine,—charged under such unconstitutional statute was committed to prison, though protesting against such invasion of his constitutional rights in every lawful way in the District Court; and when he applied for relief in the Circuit Court of Appeals by Writ of Habeas Corpus and Certiorari, the govern-

ment submits without protest to the jurisdiction of that court to so review the decision of the District Court; and it is here for the first time that petitioner is met by the contention that he had a plain and speedy remedy by appeal or writ of error, and further, that the Circuit Court of Appeals is without jurisdiction to issue writs of habeas corpus.

As to the first contention, I submit that any citizen is entitled to the writ of habeas corpus as a matter of right, whenever imprisoned without authority of law under an unconstitutional statute, especially when the highest court of the land has theretofore clearly declared such statute to be unconstitutional, and where the inferior court declines to follow such decision.

In respondent's brief filed in opposition to the application for writ of certiorari (pages 4-9), I have discussed the question of the jurisdiction of the Circuit Court of Appeals to issue write of habeas corpus, and now submit that question without further argument, believing that a reasonable construction of the Circuit Court of Appeal's act with a view of giving full effect to the general purpose to be accomplished by the creation of said court, will lead to the conclusion that it was intended to confer this power upon said court by the provisions of Section 12 of said act, wherein the Circuit Court of Appeals is granted all the powers specified in Section 716 Revised Statutes.

I would further direct the attention of the court to the fact that in the case at bar the Circuit Court of Appeals issued a *writ of certiorari* to the District Court (Transcript, folio 80, page 38), and that such writ was returned, and all the proceedings were thus brought before the Circuit Court of Appeals, and it was upon such return, that the Circuit Court of Appeals made this order discharging the prisoner (Transcript, folio 89, pages 40-43).

I think the Circuit Court of Appeals clearly had jurisdiction to issue such writ of certiorari under the provisions of section 716 of the Revised Statutes, which is expressly made applicable to the Circuit Court of Appeals by Section

12 of the act creating that Court, and which section empowers such court to issue such writs as *"may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law,"* and that such proceedings were clearly within the jurisdiction of the Circuit Court of Appeals. At most, it could only be urged that there was an irregularity of practice. This, we by no means concede, but in any event objection should have been made to such alleged irregularities in the Circuit Court of Appeals, and it cannot be raised here for the first time.

We submit further, that in no event under a record showing conclusively that the petitioner in a habeas corpus proceeding is unlawfully imprisoned, should this court exercise its discretionary power of review, over the Circuit Court of Appeals for the purpose *of re-instating a a void judgment or remanding the respondent to an unlawful imprisonment.*

In addition to the authorities herein cited, we would particularly direct the attention of the court to that portion of respondent's brief in opposition to the writ of certiorari (pages 10-16), wherein I discussed in detail some of the matters bearing upon the question of the jurisdiction of the United States for the purpose of police control over the territory embraced within the Village of Culdesac.

In the last analysis the one vital question at issue in the case at bar is: "Can a divided sovereignty for the purpose of police control exist under our system of government. We understood this question to have been absolutely settled by this Court in the matter of Heff, and as suggested before an examination of the brief of the Honorable Solicitor General in the matter of Heff, as well as the decision of the Court therein, shows that all the considerations now urged by the government in favor of qualified citizenship or a divided sovereignty, were substantially urged in the former case, and explicity passed upon adversely to the government's position. I do not understand that any new doctrine was enunciated by this court in the Heff case, but if there are any decisions of this court holding contrary thereto, certainly

these decisions must be considered as overruled or distinguished in as far as they may be urged as precedents for upholding the constitutionality of any law attempting to provide for a qualified citizenship or a divided sovereignty.

Respectfully submitted,

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